Supreme Court of the United States

October Term, 1977

No. 77-39

WILLIAM PINKUS, doing business as "ROSSLYN NEWS COMPANY" and "KAMERA",
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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I. THE DISTRICT COURT IMPROPERLY CHARGED THE JURY TO INCLUDE CHILDREN AND SENSITIVE PERSONS AS A PART OF THE COMMUNITY WHOSE STANDARD WAS TO BE APPLIED.

A. The Propriety of Inclusion of Children and Sensitive Persons in the Community Was Not Decided in Roth.

Respondent answers the first two questions presented by petitioner by arguing that the district court's charge to the jury that it include children and sensitive persons in the community whose standards were to be applied com-

ported with the instruction which this Court "expressly approved" (Resp. Br. 18) in *Roth v. United States*, 354 U.S. 476 (1957), and that in any event, when viewed in the context of the overall charge and the record the objectionable portions of the charge fade away.

Petitioner has shown in his opening brief (Pet. Br. 17-19) that neither the charge in *Roth*, nor certainly the propriety of an instruction to include children and sensitive persons as a part of the community, were under review in *Roth*. The disavowal of such review was expressly stated by Justice Harlan, *Roth v. United States*, *supra*, 354 U.S. at 507, fn. 8, and non-approval was later noted by Justice Brennan in *Ginzburg v. United States*, 383 U.S. 463, 465, fn. 3 (1966). Moreover, the court below expressed the view that children should not be included in the community "until the Supreme Court clearly indicates that inclusion is proper." *United States v. Pinkus*, 551 F.2d 1155, 1158 (Pet. App. 6a).

B. The Errors Were Not Cured by Consideration of the Entire Charge and the Trial Itself.

The district court instructed the jury on the *Roth-Memoirs* standard of obscenity (App. 55). After defining "obscene" to the jury, the trial court instructed the jury as to the procedure to be used by it in determining whether the materials before it were obscene. The Court instructed the jury that "current standards of the community" (*Ibid.*) were to be applied. To guide them in assessing those standards, the Court instructed the jury that it "must include the sensitive" (App. 57) and "to consider . . . children." (App. 58). The instruction was given over objection of petitioner (R.T. 641-643, 654-655, 659), whose offered instruction was rejected by the trial court (C.T. 191; R.T. 661-662, 672).

Respondent candidly concedes that it would have been "better practice" for the trial court "not to refer to children at all in defining community" (Resp. Br. 27), but urges nevertheless that the instructions taken as a whole were correct, particularly in view of the trial court's frequent references to the "average person". Respondent does not explain how the jury could reconcile an instruction relating to an "average person" in the community, when at the same time it was directed that it "must include" sensitive persons and children in arriving at the appropriate community, and be deemed to have in fact applied a community standard test of the appeal of the material in issue to the average person. It will be recalled that the jury received evidence on the effect of obscenity on children (R.T. 396-397; App. 38), and heard one prosecution witness describe a case in which a child had been molested by her father after he had visited an adult book store (App. 38).

Respondent relies on *Cupp v. Naughten*, 414 U.S. 141, 146-147 (1973); *United States v. Park*, 421 U.S. 658, 674-675 (1975); and *Hamling v. United States*, 418 U.S. 87, 107-108 (1974), for the proposition that the overall charge and the trial itself serve as a curative for specific deficiencies in the court's jury instructions.

The overall charge rule had its genesis in *Boyd v. United States*, 271 U.S. 104 (1926), which was cited by the court below as well as by this Court in *Cupp v. Naughten*, *supra*; *United States v. Park*, *supra*; and *Hamling v. United States*, *supra*. In *Boyd*, a part of the jury instructions was found to be ambiguous and even erroneous if given one possible interpretation. The conviction was nevertheless affirmed on a determination that upon consideration of the instructions as a whole, the jury was capable of resolving the ambiguity without prejudice to the defendant. Central to the Court's determination of

the issue was the fact that defendant had made no objection to the portion of the charge which he attacked on appeal.

In *Cupp v. Naughten, supra,* other considerations led to the application of the overall charge rule. In the state prosecution, in which the defendant did not testify, the jury was charged that every witness was presumed to speak the truth. The defendant instituted federal habeas corpus after the state courts rejected his contention that the instruction operated to shift the state's burden of proof and required that he prove his innocence. This Court determined that the questioned instruction did not deny defendant due process because there were contained in the entire charge specific instructions on the presumption of defendant's innocence and the state's burden to prove him guilty beyond a reasonable doubt, neither of which was found to have been affected by the instruction on the presumption of truthfulness.

This Court acknowledged in *Cupp* that many federal circuit courts had condemned the presumption of truthfulness charge, but nonetheless was not persuaded that the defendant's writ be granted. The Court reasoned that since the error in the challenged instruction *was not of constitutional dimension,* and inasmuch as the Oregon Court of Appeals had reviewed the charge and upheld the specific instruction upon the authority of a prior decision of the Oregon Supreme Court, the state determination would be followed. This Court made clear that its ultimate determination of the issue would not necessarily have been the same had the issue arisen in a federal prosecution, in which event it would have been permitted to exercise its supervisory jurisdiction in determining the propriety of the jury instruction. In the case at bar, this Court is reviewing a federal prosecution and has been called upon to exercise both its appellate and supervisory jurisdiction in reviewing the instructions here in issue.

The jurisdictional bar found to be operative in *Cupp v. Naughten* does not impede decision on the issues by this Court. See also, *Splawn v. California*, 431 U.S. 595, 599 (1977).

In *United States v. Park, supra,* defendant, the president of a large food chain, was convicted of violating the Federal Food, Drug and Cosmetic Act, by having caused shipments of adulterated foods. The trial court charged the jury, *inter alia,* that to convict the defendant it must find that the defendant, as president and chief executive officer of the company, had a "responsible relationship to the issue" and "in the situation out of which these charges arose." 421 U.S. at 665, fn. 9. On appeal, defendant urged that the trial court's instruction failed to define "responsible relationship". Although defendant had objected to this aspect of the charge, he had not offered the trial court a definition for its use in charging the jury. This Court held that upon consideration of the entire charge and in the context of the trial itself, the "jury could not have failed to be aware" of the main issue for determination. 421 U.S. at 675. The Court finally noted that the defendant had not offered a curative instruction and, in view of the evidence which had been presented, the trial court was under no compulsion *sua sponte* to provide such instruction. Unlike the facts in *Park,* however, the record of proceedings in this case reveals that petitioner literally implored the trial court not only to refrain from charging on children and sensitive persons, but also offered instructions which either would have expressly excluded children from the jury's consideration or limited such consideration to a community comprised of adult persons. These instructions were refused.

Nor can it be fairly stated that the jury could not have been affected by the inclusion of children and sensitive persons in its composition of the community, espe-

cially in view of the fact that it had received evidence relating to the effect of obscene materials on children.

The government's further reliance on *Hamling v. United States, supra,* in this regard, is inapposite. In *Hamling,* this Court did state that jury instructions are to be judged as a whole and held, *on the facts of that case,* that "only where there is a probability that excision of the references [complained of as error] . . . would have affected the deliberations of the jury" would reversal be required. *Id.,* at 107-108. But that standard was employed only because of the "unusual posture of [that] case" in which "the challenged instruction was proper at the time it was given by the district court" but petitioners on appeal sought "the benefit of a change in the law which casts doubt on the correctness of portions of it." *Id.,* at 108. No such circumstances exist in the instant case; accordingly, it is governed by the general standard of prejudicial error enunciated in *Kotteakos v. United States,* 328 U.S. 750, 765 (1946) by Justice Rutledge:

> "[I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Id.,* 328 U.S. at 765.

The errors in the trial court's charge to the jury here complained of constituted affirmative mis-instruction on the law which it was to apply. That law was of constitutional dimension for it was intended to instruct the jury on an essential element in the law of obscenity which

they were to apply in determining whether the materials were protected or unprotected speech. These defective instructions were not merely ambiguous statements which the jury could be said to have safely resolved. Rather, the jury is presumed to have followed the court's instruction and did exactly what it was told to do—apply a community standard which includes children and sensitive persons. Moreover, unlike the cases upon which the government relies, the jury instructions as a whole in this case did nothing to dilute or explain the error of the trial court's instruction to include children in the composite of the community. Limitations in the balance of the jury instructions to the community as a whole, rather than to a particular segment of it, did not in any way mitigate the basic constitutional evil of which petitioner complains —that children were included in the community *at all* in the jury's deliberations in a case in which the charged materials were distributed only to adults.

Where errors of constitutional dimension have occurred, the focus of review centers not only on a determination of whether the errors "contributed to the conviction," *Fahy v. Connecticut,* 375 U.S. 85, 86-87 (1963), but also on whether the prosecution has established "beyond a reasonable doubt," *Chapman v. California,* 386 U.S. 18, 24 (1967), that the errors were not prejudicial to the petitioner. Respondent has not met this heavy burden.

Respondent also relies on *Hamling v. United States, supra,* and *Smith v. United States,* 431 U.S. 291 (1977), in support of its contention that the trial court's references to "average person" sufficiently described the community whose standard is to be applied. However, neither *Hamling* nor *Smith v. United States, supra,* considered the issue of the composition of the community in the context of the instructions here at issue. Indeed, Justice Blackmun stated in *Smith* that "we hold only that the Iowa stat-

ute is not conclusive as to the issue of contemporary community standards. . . . " *Id.*, 431 U.S. at 308.

Respondent further suggests that likening the "average person" to the "reasonable man" in other areas of the law, *Hamling v. United States, supra,* 418 U.S. at 104-105, and *Smith v. United States, supra,* 431 U.S. at 302, somehow enhances respondent's position (Resp. Br. 20-21). The analogy, however, does not save the erroneous instructions. Even in those cases in which the "reasonable man" test is applied, the applicable standard is established according to the facts and circumstances appearing in the case. Thus, the standard of reasonableness against which the conduct of a child is viewed is not that which would be applicable to an adult, but rather to that of children of the same age as the child whose conduct is in issue. See, 2 F. V. HARPER AND F. JAMES, JR., THE LAW OF TORTS, 924-027 (1956). In this case, petitioner was not charged with mailing obscene materials to children and there is no evidence that children were recipients of any of the materials. The likening of the "average person" in the community to the "reasonable man" therefore, serves, if anything at all, to emphasize the necessity for the trial court to have excluded children from the jury's consideration on this record.

II. THE EVIDENCE WAS INSUFFICIENT TO WARRANT THE JURY CHARGE ON APPEAL TO DEVIANT SEXUAL GROUPS.

In his opening brief (Pet. Br. 39-45), petitioner urges that the record was insufficient to warrant the trial court's charge to the jury that the materials in issue could be found obscene upon its determination that the material appealed to the prurient interest of members of a deviant sexual group. As petitioner there notes, the court below held that, contrary to this Court's decision in *Mishkin v.*

New York, 383 U.S. 501 (1966), evidence of design and dissemination, as well as evidence which clearly defines the group was not a prerequisite to such charge, but that in any event such evidence does appear in the record.

Respondent's answer to this issue misconceives the thrust of petitioner's argument. Respondent dwells on the propriety of a charge on deviant appeal in a federal obscenity prosecution (Resp. Br. 27-30). Petitioner, however, has never taken issue with such a charge in the abstract. His point has been only that the record in this case was insufficient to justify such a charge by the trial court.

Instead of referring to evidence in the record showing design and dissemination to a clearly defined deviant group as a basis for the charge, respondent substitutes its own inferences from the materials themselves in an attempt to establish this evidence. In a boot-strap argument, respondent details the depictions in some of the exhibits, self-characterizes them as having "blatant appeal to such deviant sexuality" (Resp. Br. 31), and finally refers to the testimony of a rebuttal witness who testified that some of the material may appeal to deviants (Resp. Br. 33-34). This witness, Dr. James Rue, also testified that some of the material which he found had appeal to deviants, had appeal to normal persons as well (App. 34-41).

Respondent, however, has not pointed out any evidence in the record which serves to supply the necessary proof required by *Mishkin* to show that the material in issue was designed for and disseminated to a clearly defined deviant group.

Nor does respondent answer petitioner's contention that the charge as given failed to instruct the jury that

it must first find that the materials in issue were designed for and primarily disseminated to such deviant groups before it could consider the effect of the materials on the members of the group (Pet. Br. 45).

III. THE EVIDENCE WAS INSUFFICIENT TO WARRANT THE CHARGE ON PANDERING, WHICH CHARGE WAS ITSELF ERRONEOUS IN INSTRUCTING THE JURORS TO CONSIDER MATTERS NOT IN EVIDENCE.

Respondent attempts to refute petitioner's assertion that there was insufficient evidence in the record to warrant the district court's charge on pandering by resorting to examination of the exhibits received in evidence (Resp. Br. 36).*

No reference is made by respondent to testimonial evidence which discloses petitioner's methods of operation, circumstances of production and sale, the dimension of petitioner's business, or his instructions to authors or writers, all of which this Court has deemed essential to the giving of an instruction on pandering. *Ginzburg v. United States*, 383 U.S. 463 (1966); *Mishkin v. New York*, 383 U.S. 501 (1966); and *Hamling v. United States*, 418 U.S. 87 (1974).

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*Respondent dismisses petitioner's further suggestion that the vitality of *Ginzburg v. United States*, 383 U.S. 463 (1966), was diminished, if not completely destroyed, by *Virginia State Board of Pharmacy v. Virginia Consumer Council, Inc.*, 425 U.S. 748 (1976), by noting the affirmation of the pandering principle by a majority of the Court in *Splawn v. California*, 431 U.S. 595, 598 (1977) (Resp. Br. 35, fn. 21). However, the Court in *Splawn* did not expressly cite *Virginia Pharmacy* in its majority opinion, nor did the Court expressly address the issue presented by Justice Stevens in dissent. "Truthful statements which are neither misleading nor offensive are protected by the First Amendment even though made for a commercial purpose." *Splawn v. California, supra*, 431 U.S. at 602 (Stevens, J., dissenting).

The basis for allowance of a charge on pandering in an obscenity prosecution is bottomed on the premise that the materials themselves, standing alone, are not obscene. *Ginzburg v. United States, supra*, 383 U.S. at 465-466. It is only when the materials are viewed in the context of the defendant's business operation, methods of production and sale, as well as the other factors to which this Court has referred in the above-cited cases that such materials, otherwise not obscene under the law, can be found to be obscene. It is for this reason that *evidence* of pandering in an obscenity prosecution has been held relevant and therefore admissible. Petitioner urges that if the Government seeks to rely on pandering as a part of its case at trial, it should be required to introduce evidence of the kind and character that this Court has recognized to be evidence of pandering. And upon failure to produce such evidence, the material should be examined by the jury unaided by an instruction on pandering. The trial court's charge in this case, given without proper evidentiary support in the record, constituted prejudicial error.

It is finally noted that respondent offers no answer to petitioner's further contention (Pet. Br. 50-51), that in any event the district court's charge on pandering was error laden because the jury was instructed to consider the "setting", "manner of distribution, circumstances of production, sale and advertising" (App. 60), concerning which there was no evidence. The jury was thus permitted to resort to speculation as to these factors in reaching its verdict. *United States v. Breitling*, 20 How. 252, 254-255, 61 U.S. 252, 254-255 (1858).

IV. THE CONCURRENT SENTENCE DOCTRINE WAS ERRONEOUSLY APPLIED BY THE COURT OF APPEALS.

The district court's refusal to admit into evidence two comparable films, "Deep Throat" and "The Devil in Miss Jones," was assigned as error to the court of appeals (551 F.2d at 1161; Pet. App. 12a). Although that Court determined that the comparable films were similar to the prosecution film in issue, it declined to complete its determination of the issue of whether community acceptance of the films had been established, by invoking the concurrent sentence doctrine (551 F.2d at 1161; Pet. App. 14a).

Both in his petition for writ of certiorari and in his opening brief to this Court, petitioner has urged that the concurrent sentence doctrine was inapplicable and should not have been applied by the court of appeals (Pet. Br. 25-33). Respondent makes no response to the arguments advanced by petitioner that the doctrine was not applicable, but rather confesses error for having previously urged that the doctrine was properly invoked by the court below (Resp. Br. 40, fn. 25). Petitioner agrees with respondent. Although petitioner was sentenced to serve concurrent sentences, he was also fined $500.00 on each count, which fines were cumulative. Under such circumstances, the concurrent sentence doctrine is not applicable. *United States v. Allen,* 554 F.2d 393, 407 fn. 15 (10th Cir. 1977), *cert. denied,* ..... U.S. ..... (Oct. 3, 1977).

Petitioner therefore urges that the concurrent sentence doctrine was not applicable for both the reasons stated in its opening brief as well as for the reason noted by respondent. Petitioner does not oppose respondent's suggestion that this Court, rather than remand the case, consider the merits of petitioner's assertion of error resulting from the trial court's exclusion of the offered comparable films, because the record on this issue is complete. Moreover, in the event of remand of this case on other grounds, a decision from this Court on the comparison evidence issue will be instructive, avoid a recurrence of the issue at such retrial, and further the interests of judicial economy.

V. THE DISTRICT COURT ERRED IN EXCLUDING THE COMPARISON EVIDENCE.

The Court of Appeals determined that the two offered comparable films

> "bore a reasonable resemblance to the film 'No. 613' identified in count 9 of the indictment. . . ."
>
> "The three films were similar because they presented the same or similar sexual acts with an equal degree of explicitness." 551 F.2d at 1161 (Pet. App. 13a).

After further determination that the comparable films did not bear a reasonable resemblance to the material which formed the basis of the charges in the other counts of the indictment, the Court of Appeals abruptly terminated its review of the issue on its merits, by invoking the concurrent sentence doctrine.

Respondent argues not only that the comparable films were properly excluded with respect to those counts of the indictment not relating to film No. 613, but also, in disagreement with the finding of the Court of Appeals, further contends that the comparable films did not meet both parts of the test of admissibility established in *United States v. Jacobs,* 433 F.2d 932, 939 (9th Cir. 1970), and *United States v. Womack,* 509 F.2d 368, 377-378 (D.C. Cir. 1974) (Resp. Br. 42). That test requires that the proffered comparable evidence be shown to have (1) a reasonable resemblance to the charged material; and (2)

a reasonable degree of community acceptance. *United States v. Jacobs, supra,* 433 F.2d at 933. Petitioner contends that the comparable films satisfied the test for admissibility and were applicable both to the film charged in count number 9 and to the material charged in the remaining counts, which latter material depicted sexual activity in still rather than motion picture form.

With respect to reasonable resemblance, it cannot be denied that the comparable films depicted explicit sexual activity of the same kind, although perhaps not every kind, variety, frequency and vividness as that depicted in all of the charged materials. For one court's exposition of the depictions contained in "Deep Throat", see Respondent's Brief, p. 44, fn. 27. Surely that film No. 613 was in black and white and the offered films were in color should not be deemed such a dissimilarity as to justify their exclusion. Moreover, the photographs in "Bedplay", as to which the comparable films were also offered as comparison evidence, were in color. The comparable films were offered for the purpose of demonstrating to the jury "contemporary community standards." They went to the very essence of petitioner's defense and constituted the "best evidence," *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 56 (1973), and the best means petitioner had to show that standard to the jury.

It was not essential that the comparable films be identical in every respect to the materials charged, but merely that they bore a reasonable resemblance to the charged material with respect to the explicit depiction of sexual activity. If the offered films had been received in evidence, it would have been the jury's function to consider the comparable films as a factor in determining community standards, along with the other evidence.

Respondent argues that the comparable films depicted acts in a different form and context from the charged material (Resp. Br. 42-43). But the expression is the same no matter whether the form is still photos or motion pictures. In the law of obscenity, there is no distinction "as to the medium of expression." *Kaplan v. California,* 413 U.S. 115, 119 (1973).

With respect to community acceptance of the comparable films, petitioner submits that a stronger case for the showing of the community acceptance of these films can hardly be imagined. A witness was permitted to testify that these films were rated first and third of the most successful films in the community. Although evidence of gross revenues was presented, these figures were not introduced for the purpose of showing the commercial profit resulting from public exhibition of the films, but rather for the purpose of demonstrating the massive public acceptance of these films. This evidence disclosed that more than one-half million people in the Los Angeles area saw "Deep Throat" and more than 240,000 persons viewed "The Devil in Miss Jones." The proof of reasonable community acceptance here was far more substantial than a showing of "mere availability," cf. *United States v. Manarite,* 448 F.2d 583, 593 (2nd Cir. 1971), or that the material was within the standards of "the Block", that is, that the material enjoyed no distribution other than through small book stores clustered in a particular area of a city. *United States v. 392 Copies of Magazine "Exclusive",* 253 F. Supp. 485, 496 (D. Md. 1966), *aff'd,* 373 F.2d 633 (4th Cir. 1967).

The point here in issue narrows to the question of what degree of proof of "community acceptance" is required of a defendant in an obscenity prosecution so as to permit the admission of comparison evidence. Respondent urges this Court to determine that community acceptance is suffi-

ciently demonstrated by the showing of vast public viewing of the comparable films or reading of printed materials over an extended period of time. A defendant should have no greater burden than the production of probative evidence of such facts. If, upon such showing, the prosecution denies that community acceptance has been proved, the burden of proving non-acceptance should then rest with the prosecution. In the case before this Court, respondent offered *no* evidence to refute the clear showing of community acceptance of the offered films. Respondent's statement of reasons as why the films were not accepted in the community (Resp. Br. 43-44) are mere suppositions having no foundation or support in the record.

That "Deep Throat" was found to be obscene in other parts of the country, as respondent well notes, is of no controlling effect on the community in which venue was set for the prosecution of this case. This is especially so where several prosecutions of this film in the community itself resulted in acquittals (Resp. Br. 45, fn. 29).

Respondent finally argues that petitioner was not denied due process by the exclusion of the films because he was permitted to present other witnesses who testified on community standards (Resp. Br. 46). Testimonial proof of community standards elicited from a witness is not the same as, nor should it be equated with, demonstrative evidence of those standards about which those experts testified. Respondent does not argue that the comparison evidence was cumulative.

The trial court's refusal to admit the offered comparable films constituted prejudicial error.

CONCLUSION

For the reasons stated in his opening brief and upon the authorities and argument presented in this reply brief, petitioner respectfully urges the Court to reverse the decision of the court below.

Respectfully submitted,

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